A

CHD ENGINEERING SDN BHD

v.

AMBANK (M) BHD & ANOR; TAN KIAN SOON (THIRD PARTY)

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI JC
[CIVIL SUIT NO: 22NCC-221-02-2012]
20 SEPTEMBER 2013

C ***TORT:*** *Negligence - Banks - Signatories - Encashment of cheques - Withdrawals by director of company - Whether encashment by director within company's mandate - Whether bank acted in breach of duty - Whether company suffered losses*

D ***BANKING:*** *Banker and customer - Duty to customer - Whether bank owed a duty of care - Whether bank acted within mandate allowed by customer - Whether customer suffered losses*

CIVIL PROCEDURE: *Res judicata - Matters which could reasonably have* E *been raised in earlier proceedings - Whether plaintiff could claim against different parties in different suits over same subject matter - Whether doctrine of res judicata applied*

The plaintiff opened current accounts with AmBank and AmIslamic Bank ('the defendants'). The plaintiff's authorised signatories of the bank F accounts were its directors, Choong Hwa Doong and the third party, with either one signatory to sign for any amount of below RM10,000 or both signatories to sign jointly for any amount above RM10,000. The third party had admitted to the drawing and encashment of 114 cheques totalling RM1,114,000 purportedly to protect the interest of the plaintiff in view of a petition under s. 181 of the Companies Act 1965, in which G the court had ruled in favour of the third party. The defendants' defence against the plaintiff, *inter alia,* were that the encashment of the cheques by the third party was within the plaintiff's mandate. The defendants also contended that the act of the third party was not unusual and suspicious. The defendants argued that the principal of *res judicata* and H estoppels applied as the validity of the withdrawal of RM1,140,000 from the plaintiff's accounts formed the subject matter for both the oppression petition and the breach of trust and misrepresentation. The issues that arose for consideration, *inter alia,* were (i) whether the defendants owed a duty of care to the plaintiff; (ii) whether the defendants breached their I duty by not acting according to the mandate; (iii) whether the defendants should be put on enquiry; (iv) whether the plaintiff had suffered losses as a result of the breach of duty; and (v) whether the issues of *res judicata* and estoppels applied.

Held (dismissing plaintiff's claim with costs):

(1) The defendants owed a duty to the plaintiff as their customers in the operation of the accounts. Since the mandate given was that only one signatory was required for the sum of RM10,000 and below, the defendants had acted within the mandate given when they allowed the encashment by the third party and there was no basis for the defendants to be put on enquiry for those transactions. (paras 8, 16 & 18)

(2) The encashment of more than 114 cheques was within the mandate given and it could not be said to be highly unusual as the defendants had only dealt with the third party in the banking transactions. Therefore, the plaintiff had failed to establish breach of duty by the defendants. (paras 21 & 22)

(3) The monies withdrawn from the accounts had been used to pay for the plaintiff's expenses. The sum withdrawn by the third party from the two accounts was RM1,140,000, which was lower than the amount incurred by the third party to pay on behalf of the plaintiff. As such, the plaintiff did not incur any losses. (paras 24 & 26)

(4) Both the petition and the earlier suits dealt with the RM1,140,000, which was withdrawn by the third party from the two accounts with the defendants. If the plaintiff took the position that the defendants were responsible for the sum withdrawn from its account, it should have sued the defendants in the earlier suit instead of making its claim against different parties in different suits over the same amount. For *res judicata* to apply, the parties need not be the same. Therefore, the plaintiff had failed to establish its case against the defendants. (paras 35 & 36)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Benjamin Wong Peng Yan v. Genting Bhd & Anor [1994] 1 CLJ 351 HC ***(refd)***

Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2010] 6 CLJ 530 CA ***(refd)***

Lipkin Gorman v. Karpnale Ltd and Another [1989] 1 WLR 1340 ***(refd)***

Malayan Banking Berhad v. Yatin Mahmood [2012] 1 LNS 936 CA ***(refd)***

S & M Shopping Arcade Sdn Bhd v. CH Williams Talhar and Wong Sdn Bhd [2007] 10 CLJ 738 HC ***(foll)***

Tan Ah Tong v. Perwira Affin Bank Bhd & Ors [2001] 7 CLJ 500 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181

For the plaintiff - Colin Pereira (Lau Kok Guan with him); M/s Goh Wong Pereira
For the defendants - Andrew Teh (Foong Mun Yee with him); M/s Wong Lu Peen & Tunku Alina
For the 3rd party - Alif Ridhwan; M/s Kamaruzaman Arif, Amran & Chong

Reported by Sandra Gabriel

JUDGMENT

Azizah Nawawi JC:

[1] After a full trial of this case, I had dismissed the plaintiff's suit with costs. I will now set out the full grounds for my decision.

The Plaintiff's Case

[2] The plaintiff's claim against the defendants is premised on breach of duty of care when the defendants approved the withdrawals of RM1,140,000 by Tan Kian Soon, the third party. This claim is for the recovery of the said amount.

The Defendants' Defence And Counterclaim

[3] The defendants' defence is as follows:

(i) The cheques encashment by Tan Kian Soon was within the plaintiff's mandate pursuant to the resolution.

(ii) The defendants have no knowledge on whether the issuance of cheques by Tan Kian Soon was without the knowledge and or consent of the plaintiff and or Choong Hwa Doong and or Chong Wa Sap.

(iii) The allegation that the cheques issued by Tan Kian Soon was without the knowledge and or consent of the plaintiff and or Chong Hwa Doong and or Chong Wa Sap is a matter within plaintiff's internal management and therefore does not bind on the defendants.

(iv) Tan Kian Soon is the director and representative of the plaintiff who usually deal with defendants in respect of both the bank accounts.

(v) The act and conduct by Tan Kian Soon was not unusual and suspicious.

(vi) the issues are *res judicata*.

Third Party Proceedings

[4] On 30 May 2012, the defendants obtained leave of court to issue a third party notice dated 31 May 2012 against Tan Kian Soon. The defence of the third party is as follows:

(i) The funds were moved by the third party to protect the interests of the plaintiff.

(ii) By a petition made under s. 181 of the Companies Act 1965 *vide* Kuala Lumpur High Court Petition No: D-26NCC-11-2010, the third party had petitioned the court for relief against the acts of oppression against the third party committed by the other directors, Choong Hwa Doong and Chong Wa Sap.

(iii) The court had ruled in favour of the third party and ordered that the 51% shareholding of the third party in the plaintiff to be purchased by Choong Hwa Doong or in the alternative by the plaintiff when the financial position of the plaintiff is determined in the process of valuation of the shares.

(iv) In suit D22 NCC-681-2010, the plaintiff sought to recover from the third party the said funds but the suit was struck out by the court after holding that the same had become academic in view of the judgment of the court in the aforesaid petition.

The Facts

[5] The undisputed facts arising from the trial are as follows:

(i) On 17 September 2006, the plaintiff, CHD Engineering Sdn Bhd, opened a current account (Account No: 087-201-200177-0) with the first defendant and subsequently opened another current account (Account No: 087-202-200316-2) with second defendant on 17 July 2009. The defendants, AmBank (M) Bhd and AmIslamic Bank Bhd, are financial institutions and maintain a branch in Balakong. The plaintiff's accounts are maintained at the Balakong branch.

(ii) The directors of CHD at all material times are Tan Kian Soon, Choong Hwa Doong and Chong Wa Sap. The shareholding in CHD is as follows:

(a) Tan Kian Soon - 51%

(b) Choong Hwa Doong - 41%

(c) Chong Wa Sap - 8%

(iii) Pursuant to a plaintiff's board of directors' resolution dated 21 October 2008 ("resolution"), the plaintiff had resolved the following:

> With effect from the date of the resolution, the authorised signatories of both bank accounts of the Plaintiff with the Defendants are Choong Hwa Doong and Tan Kian Soon.
>
> The signing mandate of the plaintiff is:
>
> (a) either one signatory to sign for any amount of RM10,000 and below; or
>
> (b) both signatories to sign jointly for any amount above RM10,000.

(iv) On 10 January 2010, Tan Kian Soon issued 86 cheques of RM10,000 each for encashment into five cashier orders totalling RM860,000 and payable to himself at the first defendant's Balakong branch.

(v) On 11 January 2010, Tan Kian Soon had further issued 25 cheques of RM10,000 each for encashment into a cashier order totalling RM250,000 and payable to himself at the second defendant's Balakong branch.

(vi) Tan Kian Soon had admitted to the drawing and encashment of the 114 cheques totalling RM1,114,000 at the defendants banks' Balakong branch.

The Findings Of The Court

[6] After hearing the evidence and the submission of the parties, I am of the considered opinion that the issues to be decided by this court are:

(i) whether the defendants owes a duty of care to the plaintiff;

(ii) whether there is a breach of such duty;

(iii) whether the plaintiff had suffered loss as a result of the breach of duty; and

(iv) the issues of *res judicata* and estoppels.

Issue (i) - Whether The Defendants Owes A Duty Of Care To The Plaintiff

[7] As the plaintiff's claim against the defendants is premised on negligence, then the first issue here is whether the defendants owe the plaintiff a duty of care.

[8] On this issue, there is no dispute that the defendants owes a duty to the plaintiff, as their customers in the operation of the accounts. In *Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2010] 6 CLJ 530, the Court of Appeal held:

> It is our view that a bank is inexorably bound by a duty of care towards the account holder and has to ensure that it acts within its mandate.

Issue (ii) - Whether The Defendants Are In Breach Of Such Duty

[9] Having found that the defendants owes a duty of care to the plaintiff, the next issue then is whether the defendants are in breach of such duty. There are two issues arising here:

(i) whether the defendants had acted in accordance with the mandate; and

(ii) whether the defendants should be put on enquiry.

[10] In *Lipkin Gorman v. Karpnale Ltd and Another* [1989] 1 WLR 1340, the court held that "the principal obligation is on the bank to honour its customers' cheque in accordance with its mandate on instruction."

[11] With regards to the mandate given by the plaintiff, it is the plaintiff's pleaded case in para. 8 of the statement of claim that the plaintiff's mandate is as follows:

> 8. Mandat plaintiff dengan defendan pertama dan ke-2 berkenaan operasi bagi akaun pertama dan akaun ke-2 adalah seperti berikut:
>
> (i) Berkenaan dengan cek bernilai RM10,000.00 dan ke bawah, hanya satu penandatangan diperlukan; dan
>
> (ii) Berkenaan dengan cek bernilai melebihi RM10,000.00 mana-mana 2 penandatangan deperlukan.

[12] In the 'Agreed Statement of Facts' filed by the plaintiff, para. 4 reads as follows:

> Menurut Resolusi Lembaga Pengarah plaintif yang bertarikh 2l/10/2008, mandat plaintif dengan defendan pertama dan ke-2 berkenaan operasi bagi akaun pertama dan akaun ke-2 adalah seperti berikut:
>
> (i) Berkenaan dengan cek bemilai RM10,000.00 dan ke bawah hanya satu penandatangan diperlukan; dan
>
> (ii) Berkenaan cek benilai melebihi RM10,000.00 mara-mana 2 penandatangan.

[13] It is the submission of the plaintiff that the proper reading of the mandate is that "it was not whether each cheque was RM10,000 or less but whether the 'amount' withdrawn was RM10,000."

[14] However, I agree with the submission of learned counsel for the defendants that it is the plaintiff's pleaded case and an agreed fact between parties that the plaintiff's mandate means as follows:

(i) For cheque amount RM10,000 and below, only one signatory is required; and

(ii) For cheque amount more than RM10,000 both signatories are required.

[15] In fact, even without the word 'cheque', I would still come to the conclusion that it means one signatory is required to sign for any amount of RM10,000 and below. To extend the meaning further by combining the total value of all the cheques in order to come to a maximum sum of RM10,000 does not make commercial sense. It can only mean a single cheque with the maximum amount of RM10,000 that requires one signature.

[16] There is no dispute that the third party had drawn the 114 cheques of RM10,000 each for encashment on 10 and 11 January 2010. Since the mandate given is that only one signatory is required for sum RM10,000 and below, I am of the considered opinion that the defendants have acted within the mandate given when they allowed the encashment by the third party, a director of the plaintiff company.

[17] The next issue is whether the defendants must be put on inquiry. It is the submission of the plaintiff that the defendants had wilfully shut their eyes to what was evidently suspicious circumstances in the withdrawals of the 114 cheques and relied on the case of *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1 where the Federal Court said as follows:

> To our minds, if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care and in executing the customer's orders. See *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER p. 363.

[18] However, from the evidence of the defendants' witnesses (DW2, DW3 and DW5) it is not in dispute that the banks only dealt with the third party, a director of the plaintiff's company, with regards to the

financial transactions of the plaintiff over a period of time. There was no evidence that any other director of the plaintiff had dealt with the staff of the Balakong branch of the defendants. All the defendant' witnesses also testify that the withdrawals were within the mandate. Further, prior to relevant date, there were also multiple of cheques drawn as well as total daily withdrawal. Therefore, the transactions were not disputed and are therefore authorised by plaintiff. As such, there is no basis for the plaintiff to say that defendants should be put on enquiry for those transactions.

[19] In *Abdul Rahim Abdul Hamid* (*supra*) the Federal Court said:

> [32] ... Further, a bank is supposed to treat the customer's mandate at its face value, save in extreme cases. A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that there was a misuse of authority for the purpose of committing a fraud.

[20] The plaintiff further submits that the encashment of more than 114 cheques over two days is not a common or usual transaction. In *Malayan Banking Berhad v. Yatin Mahmood* [2012] 1 LNS 936, the customer sued the bank for unlawful withdrawal of monies from his account. He had earlier given a mandate to his solicitors to withdraw money from the account. There were eight cash withdrawals by cheques on 13 May 1999 and 14 May 1999 totaling RM235,611.91. On these facts, the High Court was of the view that since the withdrawals took place within a space of just two days and involving a substantial sum, the withdrawals were out of the ordinary and should have caused the bank to make inquiry with the appellant. The learned judge was of the view that the failure to do so on the part of the appellant was a breach of the duty of care. However, on appeal, the decision was reversed by the Court of Appeal on the basis that the withdrawals were made within the mandate given.

[21] On the facts of this case, I am of the considered opinion that encashment of more than 114 cheques over two days is still within the mandate given. The same cannot be said to be highly unusual as the defendants banks had only dealt with the third party in the banking transactions. As such, I find that the plaintiff has failed to show sufficient evidence of any misuse of authority by the third party or of any unusual circumstance to question the withdrawals by the third party of his right to make the withdrawals in accordance to the mandate.

[22] I am therefore of the considered opinion that the plaintiff has failed to establish the breach of duty by the banks.

Issue (iii) - Whether The Plaintiff Had Suffered Loss As A Result Of The Defendants' Breach Of Duty

[23] It is the plaintiff's pleaded case that the 'plaintiff has lost and/or has been deprived the monies withdrawn by TKS from the first and second account'.

[24] However, the evidence of the third party clearly shows that the monies withdrawn from the said accounts have been used entirely to pay for the expenses of the plaintiff, such as funding the plaintiff's project or to pay the plaintiff's creditors, suppliers and subcontractors. As such, it cannot be said that plaintiff has lost and/or has been deprived the monies withdrawn by TKS from the first and second account.

[25] The evidence of the third party is corroborated by the plaintiff's own document, the PKF monitoring accountant report ('PKF Report') dated 27 December 2010 which mentioned that:

> the annexed statement of payment on expenses incurred up to RM1,564,093 by Tan Kian Soon on behalf of CHD Engineering Sdn Bhd has been properly drawn up in accordance with the records of the company except for the following:
>
> (i) payment made to EE & Associates ... RM80,000.00;
>
> (ii) Cash payment of RM200,000.00 to CHD IP Sdn Bhd; and
>
> (iii) Cash payments of RM40,435.19 to Lintas Mitra Selaras and RM1,667.00 to PT Muliti Saran Citra Perkasa.

[26] After deducting the said three amounts which could not be verified by the PKF report, the total amount incurred by the third party on behalf of CHD is RM1,241,990.81. On the other hand, the sum withdrawn by the third party from the two accounts is RM1,140,000, which is lower (by RM101,990.81) than the amount incurred by the third party to pay on behalf of CHD. As such, the plaintiff did not incur any loss as the monies withdrawn have been used for its expenses.

[27] It is also the submission of learned counsel for the third party that the proceeds from Project G1 to G6 have been paid to the plaintiff, and this had been confirmed by the plaintiff. The said projects have been funded by the third party. Therefore if the third party is found liable to the plaintiff (as per the third party directions), it would amount to a windfall to the plaintiff as the plaintiff would be receiving the proceeds from the said projects without having to fund the same.

[28] In the premise, I find that the plaintiff has failed to establish that it has suffered damages, as the fund have been used entirely to finance the plaintiff's expenses; as such it cannot be said that the 'plaintiff has lost and/or has been deprived the monies withdrawn by TKS from the first and second account'

Issue (iv) - The Issues Of Res Judicata And Estoppels

[29] It is also the submission of the defendants that the validity or otherwise of the withdrawal of RM1,140,000 from CHD's accounts forms the subject matter for both the oppression petition in Originating Petition No: 26NCC-11-2010 and the breach of trust and misrepresentation suit in Civil Suit No: 22NCC-681-2010. The relevant chronology of events as set out by the defendants are as follows:

10-11January 2010	Tan Kian Soon withdraws RM1,140,000.00 from the Banks 10 February 2010 Tan Kian Soon files the oppression petition through Originating Petition No. 26NCC-11-2010 against Choong Hwa Doong, Chong Wa Sap and CHD.
8.4.2010	CHD files a breach of trust and misrepresentation claim through civil action Civil Suit No. 22-NCC-681-2010 against Tan Kian Soon and 2 others for recovery of the identical sum of monies i.e. RM1,140,000.00.
18.4.2011	the oppression petition was decided by Mohamad Ariff bin Yusof J (as he then was) whereby his Lordship ordered that the 51% shareholding of Tan Kian Soon be purchased by Choong Hwa Doong when the financial position of the company is determined.
9.5.2011	In the oppression petition, it was further ordered that KPMG was appointed to value Tan Kian Soon's shareholding in CHD.
9.5.2011	On the same day, the civil suit filed by CHD against Tan Kian Soon and 2 others was called up before the same judge, Ariff Yusof J. Based on Tan Kian Soon's testimony, the civil suit was then struck out by Ariff Yusof J on the basis that the civil suit had been rendered academic due to his Lordship's decision dated 18 April 2011 i.e. Tan Kian Soon's 51% shareholding to be purchased by Choong Hwa Doong.

	that there are no appeals filed against any of the decisions of Ariff Yusof J referred to above.
17.2.2012	CHD files this current suit against the Banks.

[30] I am of the considered opinion that there is merit in the defence submission on issue estoppels. It is not in dispute that the plaintiff had sued the third party for the same sum of RM1,140,000, which the plaintiff is now suing the defendants. If the plaintiff takes the position that the defendants are responsible or liable for the sum withdrawn from its account, it ought to have sued the defendants in the earlier suit against the third party. That suit was strike out on 9 May 2011. In his evidence, the third party had said that the suit was struck out after the learned judge held that the matter had become academic as the court had made an order in the oppression petition that any amount owed by the third party to the company would be taken into account in the valuation of shares when the buyout order is implemented.

[31] The meaning of the doctrine of *res judicata* and the circumstances under which it operates was discussed by the Supreme Court in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 where the court held as follows:

> ... What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation - *interest rei publicae finis litium*. It is only just no one ought to be vexed twice for the same cause of action - *nema debet bis vexari pro eadem* causa ...

[32] In *Tan Ah Tong v. Perwira Affin Bank Bhd & Ors* [2001] 7 CLJ 500 Abdul Malik Ishak J (as His Lordship then was) held as follows:

> The Court of Appeal in *OCBC Bank (M) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534 applied vigorously the doctrine of *res judicata* and held, *inter alia*, that when an issue could and should have been raised in an earlier proceeding, one was precluded from raising it in a subsequent action. Likewise in the present case, the plaintiff - Tan Ah Tong could and should have raised the issue of illegality of the charge at the hearing before NH Chan J (as he then was) in Civil Suit No: S5-31-1641-87 and since the plaintiff did not do so he was precluded from raising it in the present suit ... Here the conduct and the inaction of the plaintiff must be construed against him. The illegality issue was raised too late in the day.

[33] With regards to different parties, I refer to the decision of Justice Abdul Malek Ahmad in *Benjamin Wong Peng Yan v. Genting Bhd & Anor* [1994] 1 CLJ 351; [1993] 3 MLJ 713 where His Lordship held that for *res judicata* to apply, the parties need not be the same. His Lordship added:

> Where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to re litigate the issue prevented from doing so by issue estoppels but it would be an abuse of process to allow the issue to be re litigated.

[34] In the *S & M Shopping Arcade Sdn Bhd v. CH Williams, Talhar and Wong Sdn Bhd* [2007] 10 CLJ 738, on issue estoppel, the court held as follows:

> [1] Although the present case was founded on breach of duty of care and the earlier case was one on breach on contract, undeniably, the two cases arose out of the same complaint, i.e. the lettable area. Both cases therefore arose out of identical facts and dependent on the same evidence. The issues had been litigated in the earlier case.
>
> [2] The rights and liabilities of the plaintiff and the defendant herein had merged into the judgment delivered by the learned judge in the earlier case and the judgment being final, the plaintiff should be estopped from proceeding with this action.
>
> [3] As to issues which might have been and which were not brought forward in the earlier case, those issues should have been brought in the earlier case and hence even if any issues were not actually considered by the learned judge, the plaintiff was still caught by the doctrine of estoppel *per rem judicatum* ...

[35] The same position applies to this case. Both the petition and the earlier suits dealt with the RM1,140,000, which was withdrawn by the third party from the two accounts with the defendants. The plaintiff should have sued the defendants in the earlier suit instead of making its claim against different parties in different suits over the same amount.

[36] Premised on the reasons enumerated above, I find that the plaintiff has failed to establish its case against the defendants and the plaintiff's case is dismissed with costs.